# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-1456

TERRANCE L. PRIDE AND NADINE J. PRIDE, PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioners brought this action under the Federal Tort Claims Act, as amended, 28 U.S.C. 2671, *et seq.*, for damages for injuries sustained by Mr. Pride, an employee of a contractor doing dredging work for the United States, when the tank he was testing for airtightness blew open. Petitioners alleged that the United States had assumed, and breached, a duty to provide safe working conditions for the employees of its independent contractor (Pet. App. 24-29). The district court granted the government's motion for summary judgment, holding that the United States had not breached any duty owed to petitioners (Pet. App. 9-23). The court of appeals affirmed, noting that the United States is not liable under the Tort Claims Act for the negligence of employees of its independent contractors (Pet. App. 23).

The decisions below are correct and further review is not warranted.

It is settled that the United States, under the Federal Tort Claims Act, may not be held liable for negligence by or to employees of its independent contractors. 28 U.S.C. 2671; *Gowdy* v. *United States,* 412 F. 2d 525 (C.A. 6), certiorari denied, 396 U.S. 960; *United States* v. *Page,* 350 F. 2d 28 (C.A. 10), certiorari denied, 382 U.S. 979. Petitioners seek to escape from this principle by contending that (1) the work contracted for was inherently dangerous and therefore placed a non-delegable duty upon the United States, and (2) the United States actually controlled the work. Neither point is well taken.

This Court has held that the Federal Tort Claims Act does not permit imposition of strict liability for engaging in inherently dangerous activities. *Laird* v. *Nelms,* 406 U.S. 797; *Dalehite* v. *United States,* 346 U.S. 15, 45.[1] Even if petitioners were correct in asserting that state law should apply, and that under Michigan law the inherently dangerous instrumentality doctrine is an "extension of negligence, and not a doctrine of absolute liability" (Pet. 5), they still would not be entitled to maintain this action, since, under state law, dredging is not inherently dangerous. *Garczynski* v. *Darin & Armstrong Company,* 420 F. 2d 941 (C.A. 6) (applying Michigan law); *Grinnell* v. *Carbide & Carbon Chemicals Corp.,* 282 Mich. 509, 276 N.W. 535; *Olah* v. *Katz,* 234 Mich. 112, 207 N.W. 892.

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[1]There is no substance to petitioners' suggestion that *Dalehite* was "effectively overruled" by later decisions of this Court (Pet. 6). Indeed, less than two years ago, this Court expressly noted its "reaffirmation of the construction put on the Federal Tort Claims Act in *Dalehite*" to the effect that this Act excludes liability based on ultrahazardous or inherently dangerous activity. *Laird* v. *Nelms, supra,* 406 U.S. at 803.

Nor was there any showing of government control of the work. The district court correctly concluded that the undisputed facts showed only that the government had inspected the work to ascertain compliance with the contract, and not that it had assumed control of the work (Pet. App. 12, 15-17). Moreover, although the inspectors occasionally reported safety violations to the contractor, the government had assumed no duty to warn of unsafe conditions (Pet. App. 20-21). In short, there was here no more than a contractual right to inspect. That is not enough to "impose upon the Government any duty of inspection or control." *Gowdy* v. *United States, supra,* 412 F. 2d at 529; *Wright* v. *United States,* 404 F. 2d 244 (C.A. 7); *Roberson* v. *United States* 382 F. 2d 714 (C.A. 9); *Yates* v. *United States,* 365 F. 2d 663 (C.A. 4); *United States* v. *Page, supra; Buchanan* v. *United States,* 305 F. 2d 738 (C.A. 8); *Strangi* v. *United States,* 211 F. 2d 305 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

MAY 1974.